No. 15074.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. W. AGNEW,

Appellant,

vs.

CITY OF COMPTON, *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEES.

City of Compton, a Municipal Corporation, and Frank Sprague.

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Statement of the Case.

Appellees City of Compton and Frank Sprague adopt in its entirety the statement of the case contained in the Reply Brief of Appellee, H. R. Lindemulder, and in addition thereto, would note additionally that the only reference to Frank Sprague, as alleged in the Complaint, is that said defendant refused to issue an electrical permit to the Appellant, R. W. Agnew, unless said plaintiff first paid his Compton business license.

ARGUMENT.

POINT ONE.

The Complaint Does Not State a Cause of Action Which Would Entitle Him to Jurisdiction in the Federal Court.

It appears on the face of the complaint that the plaintiff and defendants are all citizens of the State of California. [See Tr. pp. 7 and 8, Paras. II, IV, V, VI and VII of the complaint], and diversity of citizenship does not exist.

The defense of lack of jurisdiction over the subject matter, lack of jurisdiction over the person and failure to state a claim which relief can be made by motion. (*Rule 12(b) Federal Rules of Civil Procedure.*)

Diversity of citizenship does not exist where the plaintiff and one of the defendants are citizens and residents of the same state. (*28 U. S. C., Sec. 41(1)(c).*)

While there is an attempt to have pleaded a cause of action under the *Federal Civil Rights Acts* (42 U. S. C. A., Sections 1981 through 1985), stripped of its excess verbiage the complaint does not come within the meaning of those Sections. The instant case is strikingly similar to the *Dinneen v. Williams,* decided by this Court on January 31, 1955, 219 F. 2d 428, where the Court noted that the plaintiff relied on "bare generalities and conclusions unsupported by factual allegations", and "If this is sufficient, then every State Court case of false imprisonment may be brought within Federal jurisdiction by the mere unsupported assertion that as a consequence of such false

imprisonment the plaintiff was deprived of due process, or of other rights secured by the Fourteenth Amendment."

Another strikingly similar case where there was a complaint for damages containing allegations of conspiracy and deprivation of rights secured by the Constitution by causing the plaintiff to be falsely imprisoned for an unreasonable time without bond, and without opportunity to confer with counsel, and where such a complaint was held not to state a cause of action, is *Yglesias v. Gulfstream Park Racing Association* (C. A. Fla.), 201 F. 2d 817, 818, Cert. den. 345 U. S. 993; and similarly, *McNutt v. United Gas, Coke & Chemical Works* (C. A. Ark.), 108 Fed. Supp. 871; and *McGuire v. Todd* (C .A. Tex. 1952), 198 F. 2d 60. Cert. denied 344 U. S. 835.

To open the jurisdiction of the Federal Courts to suits of this nature wherein mere conclusions of law unsubstantiated by any fact indicating a deprivation of a civil right, would make the lower Federal Courts immediate supervisors over every type of State action and State affairs. See the discussion on *The Proper Scope of the Civil Rights Acts,* 66 Harvard Law Review 1285.

As in the *Dinneen* case, *supra,* the suggestion of Federal jurisdiction in the instant case is "merely colorable and for the purpose of obtaining another forum." (See also *McGuire v. Hood,* 198 F. 2d 60.)

POINT TWO.

The Complaint Does Not State a Cause of Action for False Arrest or Malicious Prosecution Against These Appellees.

The plaintiff in the first portion of the complaint attempts to state a cause of action against the City of Compton for false arrest and malicious prosecution. No such attempt is made against the defendant Frank Sprague.

It has been held that a cause of action against a city is not stated by a complaint which charges that the plaintiff was wrongfully confined or that the officers of the city made a false arrest or were guilty of malicious prosecution. (*Oppenheimer v. City of Los Angeles,* 104 Cal. App. 2d 545; *Stedman v. San Francisco,* 63 Cal. 193; *Brindamour v. Murray,* 7 Cal. 2d 73; *Wood v. Cox,* 10 Cal. App. 2d 652; *Abrahamson v. City of Ceres,* 90 Cal. App. 2d 523.)

California Courts have held that a municipal corporation is not liable, in the absence of a special statute rendering it liable, for the torts of its agents in the performance of governmental as distinguished from proprietary functions. (*Henry v. City of Los Angeles,* 114 Cal. App. 2d 603.)

Further, the City Charter of the City of Compton provides:

> "Section 1418. Actions Against City. No suit shall be brought on any claim for money or damages against the city or any board, commission or officer thereof until a demand for the same has been pre-

sented as herein provided and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Except in those cases where a shorter time is otherwise provided by law, all claims for damages against the City must be presented within ninety (90) days after the occurrence, event or transaction from which the damages allegedly arose, and all other claims or demands shall be presented within ninety (90) days after the last item of the account or claim accrued.

"In all cases such claims shall be approved or rejected in writing and the date thereof given. Failure to act upon any claim or demand within the sixty (60) days from the date the same is filed with the City Controller shall be deemed a rejection thereof."

At the hearing on the motion to dismiss, no allegation was made of the filing of such a claim, or in the appeal has there been any indication that such a claim has been filed. Such a defect is fatal since the filing of the claim is a condition precedent to the action and a failure to allege such fails to state a cause of action. (*Slavin v. Glendale,* 97 Cal. App. 2d 407; *Kornahrens v. City and County of San Francisco,* 87 Cal. App. 2d 196; *Cathey v. City and County of Los Angeles,* 37 Cal. App. 2d 575.)

POINT THREE.

The Business License Ordinance of the City of Compton Is a Valid Exercise of the Police Power of the City.

The complaint also attempts to set forth a cause of action based on the illegality of the business license ordinance of the City of Compton [Ordinance No. 933, Tr. p. 16; Ordinance No. 941, Tr. p. 17]. It has been held that:

> "A municipality's imposition of a gross receipts tax for revenue, on persons engaged in various businesses and occupations, is strictly a municipal affair within the Const., art. XI, Section 6, as amended in 1914, and is within the authority of a freeholders' charter city whose charter contains no limitations or restriction on its power to levy taxes for revenue purposes."

This has been held true in the matter of lawyers licensed by the State. (*Franklin v. Peterson,* 87 Cal. App. 2d 727; and newspapers, *City of Corona v. Corona Daily Independent,* 115 Cal. App. 2d 382; and physicians, *City of Redding v. Dozier,* 56 Cal. App. 590.)

The Compton License Ordinance does not come within the meaning of *Agnew v. City of Los Angeles,* 110 Cal. App. 2d 612, or the cases cited therein at page 617, in that no additional requirement of contractors other than the payment of a business license is required.

It has been stated that in considering the validity of such an ordinance, the Court must indulge every intendment in favor of its validity, and must resolve all doubts in such a way as to uphold the law-making power. (*Siver-*

sten v. City of Menlo Park, 17 Cal. 2d 197; and *Ex parte Haskell,* 112 Cal. 412.)

A license tax imposing the same amount on all engaged in the same business, regardless of business done or profits received therefrom, is not an unreasonable discrimination against any particular person engaged in the business because its net profit is less than that of others engaged in the same business or because the imposition of the tax may even result in some person engaged in the business operating at a loss. (*American Locker Co. v. City of Long Beach,* 75 Cal. App. 2d 280.) See also as to reasonableness *Mayflower Transit Co. v. Georgia Public Service,* 295 U. S. 285.)

No constitutional rights are violated if the burden of a license tax falls equally on all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary. (*Fox Bakersfield Theatre Corporation v. City of Bakersfield,* 36 Cal. 2d 136.)

Conclusion.

That the judgment of the District Court should be upheld and the complaint should be dismissed on the threshold for its failure to state a cause of action against Appellee City of Compton, and Appellee Frank Sprague.

Respectfully submitted,

JAMES G. BUTLER,

Attorney for Appellees, City of Compton, and Frank Sprague.